# Anafartalar Caddesi Sdn Bhd v Southern Investment Bank Bhd (formerly known as Perdana Merchant Bankers Bhd)

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-379 OF 2002

MOKHTAR SIDIN, MOHD SAARI AND ABDUL AZIZ JJCA

16 DECEMBER 2002

***Land Law*** *— Restraint on dealings — Caveats — Removal of — Company wound up and lands sold by public auction — Whether the respondents being given Form 16F recognized as the purchaser of the lands — Whether the respondents were a 'body aggrieved' since they had not paid the full purchase price for the lands — Whether the appellants had locus standi to sue the respondents — National Land Code Form 16F*

The appellant company was a shareholder in Kredin Sdn Bhd ('Kredin'). The High Court had, in 1985 and under s 256 of the National Land Code ('the NLC'), ordered that three lands owned by Kredin to be sold by public auction. At the sale, the respondents were the successful bidders and received Form 16F. Form 16F is a certificate of sale and is registrable as if it is an instrument of dealing. However, the respondents could not be registered as the proprietor of the lands because the appellants had entered a private caveat against the said three lands. On 7 May 2002, the appellants were ordered by the High Court to remove the caveat. The appellants applied for an order staying the execution of the said High Court order of 7 May 2002 pending the appellants' appeal against that order. The appellants argued that the respondents were not a 'body aggrieved' since they had not paid the full purchase price for the lands and therefore had no locus standi to apply for the removal of the caveat.

**Held**, refusing a stay pending appeal:

(1) The respondents must be recognized as the purchaser of the lands and as being entitled to be registered as the proprietor of the lands having been given Form 16F. Whether the respondents had paid the purchase price to Kredin or whether the respondents had defrauded Kredin was a subject in the appellants' other suit (S7-22-162 of 2002) (see p 565H–I).

(2) Furthermore, the rule in *Foss v Harbottle* (1843) 2 Hare 461 precluded the appellants from suing the respondents for any relief on the basis of any complaint about the sale of Kredin's land to the respondents. Only Kredin or their liquidator could sue the respondents on such a complaint. Since the appellants had no locus standi to challenge the respondents' position as the purchaser of the lands, they had no reasonable prospect of success in arguing that the respondents were not a 'body aggrieved' under s 327(1) of the NLC (see p 566D, F–G).

**[Bahasa Malaysia summary**

Syarikat perayu adalah pemegang saham dalam Kredin Sdn Bhd ('Kredin'). Mahkamah Tinggi telah, pada 1985 dan di bawah s 256 Kanun Tanah Negara ('KTN'), memerintahkan agar tiga keping tanah yang dimiliki oleh Kredin dijual melalui lelongan awam. Semasa jualan, responden-responden merupakan penawar yang berjaya dan telah menerima Borang 16F. Borang 16F adalah sijil jualan dan boleh didaftarkan sebagai satu alat urusan. Namun begitu, responden-responden tidak boleh didaftar sebagai tuanpunya tanah-tanah tersebut kerana perayu-perayu telah memasukkan satu kaveat persendirian terhadap ketiga-tiga keping tanah tersebut. Pada 7 Mei 2002, perayu-perayu telah diperintahkan oleh Mahkamah Tinggi untuk membatalkan kaveat tersebut. Perayu-perayu telah memohon satu perintah untuk menggantungkan pelaksanaan perintah Mahkamah Tinggi yang bertarikh 7 Mei 2002 tersebut sementara menunggu rayuan perayu-perayu terhadap perintah tersebut. Perayu-perayu berhujah bahawa responden-responden bukan satu 'body aggrieved' kerana mereka tidak membayar penuh harga belian untuk tanah-tanah tersebut dan oleh itu tidak mempunyai locus standi untuk memohon satu pembatalan kaveat.

**Diputuskan**, menolak satu penggantungan sementara menunggu rayuan:

(1) Responden-responden harus dikenali sebagai pembeli tanah-tanah tersebut dan berhak untuk didaftarkan sebagai tuanpunya tanah-tanah tersebut kerana diberikan Borang 16F. Sama ada responden-responden telah membayar harga belian kepada Kredin atau sama ada responden-responden telah menipu Kredin adalah satu perkara dalam guaman lain perayu-perayu (S7–22–162 tahun 2002) (lihat ms 565H–I).

(2) Tambahan pula, peraturan dalam *Foss v Harbottle* (1843) 2 Hare 461 mengecualikan perayu-perayu daripada menyaman responden-responden untuk apa-apa relif berdasarkan apa-apa aduan tentang penjualan tanah Kredin kepada responden-responden. Hanya Kredin atau penyelesainya sahaja yang boleh menyaman responden-responden berkaitan aduan sedemikian. Memandangkan perayu-perayu tidak mempunyai locus standi untuk mencabar kedudukan responden-responden sebagai pembeli tanah-tanah tersebut, mereka tidak mempunyai peluang yang munasabah untuk berjaya dalam menghujahkan bahawa responden-responden bukan satu 'body aggrieved' di bawah s 327(1) KTN (lihat ms 566D, F–G).]

**Notes**

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.

**Cases referred to**

*Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417 (refd)
*Foss v Harbottle* (1843) 2 Hare 461 (refd)
*Goh Pak Swan v Ng Choo Lum @ Ng Poon Lum* [1997] 1 CLJ 77 (refd)
*Wallersteiner v Moir (No 2)* [1975] 2 WLR 389 (refd)

**Legislation referred to**

Companies Act 1965 s 264
Courts of Judicature Act 1964 s 44
National Land Code ss 256, 259(3), 323(1)(a), (b), (c), (2), 327(1), Forms 16F, 19B

**Appeal from:** Originating Summons No S1–24–296 of 2002 (High Court, Kuala Lumpur)

*Bastian Pius Vendargon* (*Jayaraman, Ong & Co*) for the appellants.
*Lambert Rasa-Ratnam* (*Sean HM Yeow* with him) (*Lee Hishammuddin*) for the respondents.

**Abdul Aziz JCA** (delivering judgment of the court): On 15 July 2002, we dismissed the appellant company's notice of motion for an order under s 44 of the Courts of Judicature Act 1964 staying the execution of an order of the High Court at Kuala Lumpur made on 7 May 2002 pending the appellants' appeal to this court against that order, which was an order for the removal of a private caveat entered by the appellants against three lands whose registered owner was at all material times a company whose former name was Kredin Sdn Bhd ('Kredin'). The appellant company were a shareholder in Kredin. The High Court had dismissed the appellants' application for a stay of execution.

The High Court had, on 18 March 1985 and under s 256 of the National Land Code ('the NLC'), ordered the three lands to be sold by public auction. At the sale on 12 July 1993, the respondents were the successful bidder. On 6 August 1993, Form 16F was received by the respondents.

Form 16F is a certificate of sale, signed by the proper officer of the court which according to s 259(3) of the NLC, the purchaser at a sale under s 256 is entitled to receive upon payment to the officer of the full amount of the purchase price and which, according to s 267, is registrable by the purchaser as if it were an instrument of dealing. As in every other case, the certificate of sale received by the respondents in this case acknowledged receipt of the full amount of the purchase price.

Despite obtaining Form 16F, the respondents could not be registered as the proprietor of the lands because of the existence of caveats by Kredin against the lands. There were five caveats entered on different dates.

On 14 November 2000, on the respondents' petition, Kredin were ordered to be wound up for failure to pay a debt of RM8,447,433.76.

Of Kredin's five caveats, one lapsed, and the other four the respondents successfully applied to be removed. The last caveat to be removed was removed on 17 September 2001. A

Eleven days later, on 28 September 2001, the appellants entered the caveat the removal of which by the High Court on 7 May 2002 is the subject of a pending appeal to this court by the appellants. B

According to s 323(1) of the NLC, a private caveat may be entered only at the instance of the following persons or bodies:

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and C

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b).

Subsection (2) of s 323 requires the applicant for the entry of a private caveat to state in the application. Form 19B, 'the nature of the claim on which his application is based'. To comply with that requirement, what the appellants stated in their application form was that the respondents had obtained the Form 16F, the certificate of sale, without payment of the purchase price and that the appellants' purpose in entering the caveat was to ensure that Kredin's registered proprietorship of the lands was not lost. D

On 14 February 2002, the appellants filed a writ action against the respondents (S7–22–162–2002) seeking certain declarations, one of which is a declaration that the respondents have not purchased the lands. The appellants' reason for alleging that the respondents had not purchased the lands may be inferred from para 12(6) of the statement of claim where it is alleged that the respondents had paid to the court only 10% the purchase price and not the full amount of the purchase price. Paragraph 17 of the statement of claim states that the appellants had lodged the private caveat 'to protect its caveatable interest pending due determination of the issues herein to maintain the status quo from being irreparable [sic] lost'. E F

In submission before us, the respondents' counsel admitted that the purchase price (or part of it) was paid by 'contra', the mechanics of which it was not necessary to explain for the disposal of the appellants' application before us for a stay of execution of the order of removal of the caveat, and were not explained. G

Although the hearing before us was not of the appeal against the removal of the caveat, it was clear from the appellants' statement of the nature of their claim that they made in their application for the entry of the private caveat that their claim did not fall under any of the paras (a), (b) and (c) of s 323(1) and that they were not therefore a body at whose instance a private caveat may be entered. In other words, going by their own claim, they had no locus standi to have a caveat entered. H

Before us, the appellants' counsel sought to base the appellants' locus standi on a claim which was different from what they had stated in their caveat application. Apart from such a change of ground not being I

permissible, as stated by this court in *Goh Pak Swan v Ng Choo Lum @ Ng Poon Lum* [1997] 1 CLJ 77 at p 87, we saw no merit in the argument for the new claim.

The argument had been raised in submission in the High Court on the respondents' application for removal of the caveat. There the appellants did not dispute that the position in law is that a shareholder of a company has no interest in the assets of the company. But they argued that that is the position of a shareholder where the company is not wound up, but where a company, like Kredin, is wound up, they argued that the position is different and they based their argument on s 264 of the Companies Act 1965, and it was on s 264 that their counsel based their argument before us.

Section 264 is in fact applicable only to a voluntary winding up. It provides as follows:

> Subject to the provisions of this Act as to preferential payments the property of a company shall, on its winding up, be applied pari passu in satisfaction of its liabilities, and subject to that application shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

The argument of the appellants' counsel amounted to this, that by virtue of the fact that in Kredin's liquidation the appellants, as a member of Kredin, would be. entitled to a share in the surplus property, if any, of Kredin, the appellants fell under para (a) of s 323(1) of the NLC as a 'body claiming title to, or any registrable interest in, [the lands] or any right to such title or interest'. It amounted to saying that after a company whose property includes land has been ordered to be wound up, if there is, after paying off creditors, to be surplus property to which the members of the company are entitled, they have title, or a right to title, to the land and therefore may be registered as the proprietors of the land, or they have an interest, or aright to an interest, in the land that may be registered, and each of them may lodge a private caveat against the land by virtue of para (a) of s 323(1) to prevent any dealing with the land pending the realization of their claims. We rejected the proposition as an absurdity that would turn the business of winding up of companies topsy-turvy.

As a point on which the appellants placed hopes for a chance of success in the pending appeal, their counsel placed before us the proposition that the respondents were not a 'body aggrieved' and therefore did not have locus standi under s 327(1) of the NLC to apply for the removal of the caveat because they were not, it was argued, a purchaser of the lands, not having paid the entire amount of the purchase price to the proper officer of the court.

Prima facie, having been given the Form 16F, the respondents must be recognized as the purchaser of the lands and as being entitled to be registered as the proprietor of the lands. Whether the respondents had paid the purchase price in a manner that the law requires or allows is the subject of the appellants' action in S7–22–162–2002. The aim of that action is to show that Kredin had been defrauded in that the respondents were recognized by the proper officer of the court as the purchaser of the lands

when they had not paid for the lands in the way in which they should have. The purpose of the appellants' caveat was to preserve the lands in the name of Kredin pending the determination of the appellants' action.

Before us, the respondents' counsel submitted to the effect that the appellants, as a member or contributory of Kredin, had no right and therefore no locus standi to sue for any wrong done to Kredin. The basis of the submission was the rule in *Foss v Harbottle* (1843) 2 Hare 461, about which Lord Denning had this to say in *Wallersteiner v Moir (No 2)* [1975] 2 WLR 389 at p 395:

> It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle* (1843) 2 Hare 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue.

See *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd & Ors* [1995] 3 MLJ 417 at p 429B–C.

We agreed that the rule in *Foss v Harbottle* (1843) 2 Hare 461 precluded the appellants from suing the respondents for any relief on the basis of any complaint about the sale by auction of Kredin's lands to the respondents. Only Kredin or, in their liquidation, their liquidator can sue the respondents on such a complaint. The appellants had no locus standi to challenge, on the basis of any such complaint, the respondents' prima facie position as the purchaser of the lands. Only Kredin or their liquidator could do that. Kredin had in fact done so by filing action 22–129–97 on 11 March 1997 before they were ordered to be wound up but that action was struck off on 17 September 2001, after they had been ordered to be wound up, because their provisional liquidator did not appear in court for case management. On 11 March 2002, they filed a notice of motion for extension of time to appeal to this court. The motion is pending in this court.

Since the appellants had no locus standi to challenge the respondents' prima facie position as purchaser of the lands, they had no reasonable prospect of being able to successfully argue in the appeal that the respondents were not a body aggrieved under s 327(1) of the NLC. The respondents' grievance was manifest. The appellants' caveat prevented them, the possessor of the certificate of sale Form 16F, from getting on the register of titles.

On both the question of body aggrieved and the question of caveatable interest, it was plain and obvious to us that the appeal could not succeed. For that reason, we refused a stay pending appeal.

*Stay pending appeal refused.*

Reported by Zahid Taib